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Federal Communications Commission
Office of the Secretary

VIA HAND DELIVERY AND ECFS

November 20, 2007

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Suite 5-C327
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: *Ex Parte*, Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172

Dear Secretary Dortch:

In accordance with the Second Protective Order in the above-referenced proceeding,[1] enclosed for filing are two copies of the redacted version of the attached letter being submitted by 18 CLECs.

Under separate cover and in accordance with the Second Protective Order in this proceeding,[2] copies of the Highly Confidential Information are being submitted to you along with Gary Romondino, Jeremy Miller and Tim Stelzig of the Wireline Competition Bureau. Certain other individuals at the Commission are also being provided a copy of the unredacted version of this filing.

To the extent any party wishes to access the Highly Confidential Information associated with this filing, it should send its request in writing to Christine Johnson (christine.johnson@bingham.com) and Stu Eaton (stu.eaton@bingham.com) along with executed Acknowledgments of Confidentiality associated with the Second Protective Order.

[1] *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas,* WC Docket No. 06-172, Order, 22 FCC Rcd 892, DA 07-208, ¶ 15 (WCB rel. Jan. 25, 2007) ("Second Protective Order").

[2] *Id.*

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Also enclosed is an extra copy of this redacted filing, please date stamp and return it to the courier. Should you have any questions about this filing, please contact me.

Sincerely,

Nguyen T. Vu

Enclosure

[REDACTED FOR PUBLIC INSPECTION]

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445 Twelfth Street, SW
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Re: *Ex Parte*, Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172

Dear Ms. Dortch:

The undersigned carriers respond to Verizon's November 16, 2007 *ex parte* filing, purporting to show that forbearance in each of the six MSAs is warranted.[1] Verizon is flatly wrong. Its most recent letter combines a belabored rehash of its previous submissions with astonishing misrepresentations of prior Commission decisions, and entirely fails to satisfy its burden under the Omaha standard for the forbearance relief requested.

As the petitioner, Verizon has the burden of proof in this proceeding. It must demonstrate that its forbearance requests fully satisfy the statutory standards for relief. The Commission has explained that in "pursuing relief through the vehicle of forbearance ... the Petitioner [has] the obligation to provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards."[2] A petitioner

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[1] Letter from Evan T. Leo, outside counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172, (filed Nov. 16, 2007) ("Verizon November 16, 2007 *Ex Parte*").

[2] *Petition for Forbearance From E911 Accuracy Standards Imposed On Tier III Carriers For Locating Wireless Subscribers Under Rule Section 20.18(h)*, 18 FCC Rcd

must present a detailed showing of the services and facilities for which and the statutory and regulatory provisions from which it seeks forbearance.[3]

In its Petitions, Verizon expressly and repeatedly based its claim that it met the statutory forbearance standard on the factual criteria employed in the *Omaha Forbearance Order*. It repeatedly asserted, with respect to each of the six MSAs, that competition was "more advanced than it was in the Omaha MSA."[4] It declared that it was providing the Commission "the same types of information on which the Commission relied to forbear from loop and transport unbundling and from dominant-carrier regulation of switched access services in Omaha."[5] In short, Verizon chose to base its entire case in this proceeding on the assertion that it could demonstrate facts that fit the Omaha model—an assertion that it utterly has failed to prove.

Verizon now tries to back away from the standard of the *Omaha Forbearance Order*. It cites *Earthlink* to the effect that the forbearance provisions of the Act impose

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24648, ¶ 24 (2003) (rejecting claim that petitioners' burden in a forbearance petition is "lower" than the burden applicable in a waiver petition); *see also In re Core Communications, Inc.*, 455 F3d 267, 279 (D.C. Cir. 2006) (stating that the FCC found that the Petitioner provided "no evidence" in support of arguments for forbearance); *Policy and Rules Concerning the Interstate Interexchange Marketplace*, 14 FCC Rcd 391, ¶ 28 (1998) (denying forbearance because "petitioners have not met their burden with respect to the first and second prongs of the forbearance standard."); *Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934 as Amended*, 15 FCC Rcd 7066, ¶ 7 (petitioner "must explain" benefits of forbearance).

[3] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶ 16 (2005) ("*Omaha Forbearance Order*") *petitions for review denied in part, dismissed in part, Qwest Corp. v. FCC & USA*, 482 F.3d 471 (D.C. Cir. 2007) (rejecting forbearance request because the Petitioner failed to identify specific regulations or to explain how they meet certain section 10 criteria).

[4] Verizon Petition for Forbearance in the Virginia Beach MSA at 3, WC Docket No. 06-172, filed September 5, 2006 ("Virginia Beach Petition"). Each of Verizon's other five petitions contained substantially identical language, but we cite only one instance to avoid repetition.

[5] Virginia Beach Petition at 17.

"no particular mode of market analysis or level of geographic rigor."[6] Indeed, Verizon theoretically could have attempted to justify forbearance on some other basis than the *Omaha Forbearance Order*—but it chose not do so. It is far too late now for Verizon, in the last moments of this proceeding, to jettison the premise of its Petitions that forbearance is justified under the standards of the *Omaha Forbearance Order*. The Commission is "under no statutory obligation to evaluate [a forbearance] petition other than as pled,"[7] and it would be highly disruptive of the administrative process to entertain new legal and factual theories at the eleventh hour.[8]

Verizon has failed to show that competition is anywhere near as advanced in its markets as in Omaha, and the record in fact shows the opposite. Verizon steadfastly refuses to provide a measurement of competition consistent with the specific measurements that the Commission relied upon in Anchorage or Omaha, surely because it knows that doing so would show that it cannot meet its burden under the Omaha standard. Instead, Verizon now resorts to broken-record advocacy, misrepresenting the *Omaha Forbearance Order*, misrepresenting the record, and cluttering the record with irrelevant data in an effort to distract attention from its failure to meet its burden of proof. Verizon's misleading and mistaken arguments are addressed in turn below.

Cable Coverage

Verizon realizes that it does not face the same magnitude of cable competition in these six MSAs as Qwest did in Omaha or ACS in Anchorage. Apparently heeding the old adage, "When the facts are against you, argue the law," Verizon now argues that the level of actual competition isn't all that important anyway. It claims that the Commission's "primary focus" in Omaha was "not on the extent to which the incumbent cable operator had already succeeded in winning customers, but instead on the extent of its network facilities."[9] Verizon is wrong. In Omaha and Anchorage, the Commission's

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[6] Verizon November 16, 2007 *Ex Parte* at 6 citing *Earthlink v. FCC*, 462 F. 3d 1, 8 (D.C. Cir. 2006) ("Earthlink").

[7] *Omaha Forbearance Order*, ¶ 61 n.161.

[8] To be sure, the undersigned carriers do not believe that the *Omaha* and *Anchorage Forbearance Orders* correctly or completely applied the requisite statutory standards, although our concerns are somewhat different than Verizon's. Nonetheless, Verizon chose to rely on this standard, and if it cannot demonstrate factually that its markets satisfy the same competitive criteria as Omaha or Anchorage, then its petitions may be denied for this reason alone.

[9] Verizon November 16, 2007 *Ex Parte* at 1.

threshold criteria in determining whether to entertain a UNE forbearance request was the cable operator's "strong success" and whether the cable operator had surpassed a critical and significant market share threshold of residential voice lines in the MSA.[10] If that threshold was surpassed, then and only then did the Commission consider "cable coverage" by wire centers to determine where to grant UNE forbearance.[11] Indeed, before considering cable coverage by wire centers, the Commission first found in the *Omaha Forbearance Order* that Cox had "proven it is capable of competing very successfully using its own network to provide services in the mass market where the revenue potential, compared with the enterprise market, is relatively low. Indeed, in the residential market, Cox has **[REDACTED]** voice customers in this MSA **[REDACTED]** Qwest."[12] Likewise, in the *Anchorage Forbearance Order*, the Commission's preliminary finding was that "GCI has captured [**confidential**] percent of the residential lines in the Anchorage study area."[13] It noted that "Based upon staff calculations ACS has [**confidential**] residential retail lines, GCI has [**confidential**] residential retail lines,.." in the Anchorage study area.[14] The Commission relied upon the capture of significant market share by these competitors in justifying its conclusions as to all three prongs of the statutory forbearance standard.[15]

Verizon's novel position would practically repeal Section 251(c)(3) of the Act entirely. If forbearance from Section 251(c)(3) obligations were based solely on cable coverage, then ILECs automatically would be entitled to forbearance whenever and

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[10] *See Omaha Forbearance Order*, ¶ 66, n.172; *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, ¶ 28 (2007) ("*Anchorage Forbearance Order*"), *appeals dismissed, Covad Communications Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007)

[11] *See Omaha Forbearance Order*, ¶ 69; *Anchorage Forbearance Order*, ¶ 32, 35.

[12] *Omaha Forbearance Order*, ¶ 66 and n.172 (noting that "Cox submits that as of May 1, 2005, it has **[REDACTED]** residential lines (accounting for second lines in some residential locations). Qwest reports that as of December 2004, it has **[REDACTED]** residential retail access lines (accounting for second lines)") (citations omitted).

[13] *Anchorage Forbearance Order*, ¶ 28.

[14] *Anchorage Forbearance Order*, n.86.

[15] *Omaha Forbearance Order*, ¶¶ 66, 73, 75; *Anchorage Forbearance Order*, ¶¶ 28, 48, 49.

wherever a cable company started offering voice service. It would not matter if a competitor had even signed up a single customer; as soon as the cable company equips its network to provide voice, it will automatically have "coverage" everywhere that its network extends. Since cable networks pass 86.3%[16] of occupied households in the United States and most major cable companies now offer voice service, Verizon's argument would compel forbearance in nearly every metropolitan area immediately on a nearly indiscriminate basis. While Verizon would prefer this result, it is simply not contemplated under the previous Commission orders that Verizon claims to be following, nor is it consistent with the standards required by Section 10 of the Act.

If anything, far from the sweeping, indiscriminate forbearance sought by Verizon, the Commission should adopt a more rigorous standard than was employed in the *Omaha Forbearance Order* to prevent the risk of a duopoly that will restrict output and impose higher prices on end users. The *Omaha Forbearance Order* predicted that no duopoly would result because Qwest would have an incentive to offer reasonable terms for wholesale access to its network. No such prediction can rationally be made in this case, both because of subsequent experience in Omaha, and because of Verizon's own track record of raising wholesale prices to levels that exclude its competitors from retail markets.[17]

Verizon's argument that the Commission should follow a "coverage-only" test also ignores the statements in the *Omaha Forbearance Order* that the decision was based on the specific circumstances in that market.[18] A coverage-based test would ignore

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[16] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 32 (2006) (stating that cable systems with 36 or more channels are available to 86.3 percent of occupied households).

[17] *See* Letter from Andrew D. Lipman, Bingham McCutchen LLP, Counsel for Cavalier *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (Sep 4, 2007) at 8-11; Letter from Andrew D. Lipman *et al.*, Counsel for Cavalier *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Oct. 3, 2007) at 2-5; Letter from Andrew D. Lipman *et al.*, Counsel for Cavalier *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (Nov. 1, 2007) at 1-3.

[18] *Omaha Forbearance Order*, n.4 ("this proceeding considers factors unique to the Omaha MSA. It does not consider and does not reach the situation where the incumbent LEC's primary competitor uses unbundled networks elements (UNEs), particularly unbundled loops, as the primary vehicle for serving and acquiring customers in the relevant market. Such a situation necessarily raises different issues with respect to our section 10 analysis."), n.49 ("stress[ing] that [its] decision today is based on the totality

differences in actual market conditions among areas throughout the country. Thus, when Verizon claims it has shown that "competition from cable is just as widespread in the six MSAs for which Verizon seeks forbearance as it was in Omaha[,]"[19] it evidently means geographically widespread, not as successful or as widespread in terms of subscribership. But the same statement (in terms solely of geographic coverage) likely could be made of most MSAs in the country. While there may be many areas within the six MSAs where cable operators offer voice services to a large proportion of residential end users, that is not the Omaha/Anchorage standard, so merely showing geographic coverage does not satisfy Verizon's burden of proof.

In any event, Verizon has not satisfied its burden of proof with regard to cable coverage either. Verizon itself provided *no* data whatsoever to show the specific wire centers covered by competitive facilities-based voice services. The Commission has received coverage information from some, but not all, of the cable providers. This data, however, is insufficient to permit the Commission to determine the specific wire centers in which these companies are capable of serving "75 percent of the end user locations accessible from that wire center."[20] Nor has Verizon shown or does the record reveal that

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of the record evidence particular to the Omaha MSA"), Statement of Chairman Kevin J. Martin (explaining that "Cox has become a formidable competitor to Qwest in the Omaha MSA" and that the Omaha Forbearance Order is "based on the specific market facts that have been placed before [the Commission]").

[19] Verizon November 16, 2007 *Ex Parte* at 2.

[20] *Omaha Forbearance Order*, ¶ 69. This standard requires consideration of both residential and business end user locations. The only cable company that expressly provided any estimate of the number of business end user premises it is capable of serving was Time Warner. The other companies either provided no estimate at all of business locations they are capable of serving, or provided very generalized estimates of "coverage" that did not describe their methodology and were unclear as to whether business locations were included. *See, e.g.*, Letter from Philip J. Macres, Counsel for RCN, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Nov. 9, 2007) at 3. Although Cox did provide its coverage information and Charter did for some, they provided no detail regarding how it was determined. *See* Letters from J.G. Harrington, Counsel for Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed October 30 & Nov. 1, 2007); Letter from K.C. Halm, Counsel for Charter, to Marlene H. Dortch, Secretary, FCC, WC Doc. No.06-172 (filed Nov. 6, 2007). Time Warner's residential coverage estimate is based on a allocation method that has serious methodological flaws and fails to match US Census housing estimates. *See* Letter from Russell M. Blau, Counsel for Cavalier, to Marlene H. Dortch, Secretary, FCC, WC Doc. 06-172 (filed Nov. 9, 2007). While Comcast did not provide any coverage information,

where cable operators did provide coverage data, they offer a full range of services that are complete "substitutes" for Verizon's local service offering in these geographic areas. In fact, Time Warner and RCN specifically stated that they "lack the precise nature of Verizon's services" and are "unable to state whether consumers view" their services when compared to Verizon's as "substitutes."[21]

Decline in Switched Access Lines

Verizon also contends that forbearance is warranted since its switched access lines are steadily declining in each of the MSAs despite an increase in the number of households. Contrary to Verizon's claims, this does not demonstrate that the Omaha residential market share threshold requirement is met, and does not satisfy Verizon's burden of proof.

Verizon's access line loss percentages are overstated in many ways. First, as Verizon admits, they do not attribute MCI to Verizon.[22] Second, it is likely that a large proportion of the lost residential lines are second lines that were replaced by Verizon's own DSL lines, which rose from 150,000 in 2000 to over 5.1 million in 2005.[23] Third, Verizon's wireline loses are aligned with the industry trends in residential subscribership (*i.e.*, the declines are not a product of competitive conditions specific to the six MSAs at issue),[24] and are likely more than offset by the more than 2.3 million customers added by

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Verizon attempted to estimate it based on homes passed, which suffers from the same flaws as the Time Warner data. *See* Verizon November 16, 2007 *Ex Parte* at 3.

[21] *See* Letter from Philip Macres, Counsel for RCN, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Nov. 9, 2007) at n.6; Letter from Brian Murray, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Nov. 5, 2007) at n.5.

[22] *See, e.g.,* Verizon Boston Petition, Attachment A at n.2.

[23] Sprint Nextel Corporation's Opposition to Petitions for Forbearance, WC Docket No. 06-172 (filed Mar. 5, 2007) at 13; *see also* Comments of National Association of State Utility Consumer Advocates *et al.*, WC Docket No. 06-172 (filed Mar. 5, 2007) ("NASUCA 3/5/07 Comments") at 65; *see also* Comments of Broadview Networks, Inc. *et al.*, WC Docket No. 06-172 (filed Mar. 5, 2007) at 26; Comments of Ad Hoc Telecommunications Users Committee, WC Docket No. 06-172 (filed Mar. 8, 2007) ("Ad Hoc 3/8/11 Comments") at 2, Declaration of Lee Selwyn ¶¶ 2-6 (confidential).

[24] *See, e.g., Local Telephone Competition: Status as of June 30, 2006* at Table 1 and 2; *see* NASUCA 3/5/07 Comments at 66.

Verizon Wireless and 1.8 million broadband and FiOS lines.[25] In fact, Verizon has publicly stated that its FIOS service and long-term contract arrangements[26] are prompting access line *gains*. During Verizon's 2007 Third Quarter Earnings Conference Call, it announced that in the markets where it offers FiOS, "*we are actually seeing access line gains where only six months ago we were losing lines.*"[27] Likewise, in Verizon's 2007 Second Quarter Earnings Conference Call, Verizon specifically stated that "we see a correlation between FiOS penetration and line loss improvements."[28] Verizon's trend analysis fails to take this into account and is therefore not reflective of future trends. This is likely why Verizon abruptly ends its trending as of June 2006.[29] Verizon's failure to reflect wireline gains in its November 16 filing smacks of the worst gamesmanship and demonstrates its line loss argument has no merit whatsoever.

In any event, Verizon's line loss statistics alone cannot and do not show that *facilities-based* competition in each of the six MSAs is sufficient to meet the statutory forbearance standard, since Verizon cannot show that all of the lost lines represent lines gained by facilities-based competitors.

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[25] Opposition of Cavalier Telephone Subsidiaries to Verizon's Petitions for Forbearance, WC Docket No. 06-172 (filed Mar. 5, 2007) at 15.

[26] For instance for Verizon's bundled offerings require "one and two year commitment[s]." See http://www22.verizon.com/ForYourHome/NationalBundles/NatBundlesHome.aspx#

[27] VZ-Q3 2007 Verizon Earnings Conference Call, Statement of Doreen Toben, Verizon Chief Financial Officer, at 4, http://investor.verizon.com/news/20071029/3Q07_vz_transcript.pdf.

[28] VZ-Q2 2007 Verizon Earnings Conference Call, Statement of Doreen Toben, Verizon Chief Financial Officer, at 5.

[29] While Verizon claims its retail switched business lines have declined over the past five years, any loss Verizon suffered has also been more than offset by the dramatic growth in special access lines over the same period. Comments of Time Warner Cable, WC Docket No. 06-172 (filed Mar. 5, 2007), at 15; Comments of the National Cable & Telecommunications Association, WC Docket No. 06-172 (filed Mar. 5, 2007) ("NCTA 3/5/07 Comments") at 9. NCTA explains that in 2000, Verizon provided approximately 8.5 million voice grade equivalent lines via special access in the relevant states. By 2005, the figure increased to 52 million lines, an increase of more than 500 percent. NCTA 3/11/07 Comments at 9; *see also* Ad Hoc 3/8/11 Comments, Declaration of Lee Selwyn ¶ 9 (confidential).

Share of Mass Market Voice Connections

Verizon again contends that the Commission in the *Omaha Forbearance Order* "rejected market share as a primary indicia of competition, and instead relied on "facilities coverage" of cable voice services."[30] It argues that "[a]lthough the Commission did consider market share in Omaha, it did so only as one of several factors relevant to forbearance from dominant-carrier regulation, and did not consider market share at all with respect to forbearance from unbundling regulations."[31] Again, Verizon is wrong.

Nowhere in either the *Omaha Forbearance Order* or *Anchorage Forbearance Order* is there any statement that the Commission rejected market share as a primary or relevant factor in considering requests for forbearance from Section 251(c)(3) obligations. To the contrary, in the *Omaha Forbearance Order*, the Commission specifically relied on evidence of the share of mass-market access lines served by Cox, and also considered (although it gave less weight to) Cox's share of the enterprise voice market. The Commission began its Section 251(c)(3) forbearance analysis by examining the status of competition in the MSA,[32] and then found that "in the residential market, Cox has **[REDACTED]** voice customers in this MSA **[REDACTED]** Qwest."[33] Thus, far from not addressing mass market share, the Commission explicitly began its unbundling forbearance analysis with an examination of retail competition and made a specific finding of the relative share of lines served by Cox and Qwest. Verizon's statement that the Commission in the *Omaha Forbearance Order* "did not consider market share at all with respect to forbearance from unbundling regulations" is demonstrably and utterly false.

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[30] Verizon November 17 *Ex Parte* at 5. Verizon also asserts that the Commission has consistently held "historic measures of static market shares are not especially meaningful in a competitive analysis." Id. Verizon overlooks the fact that because regulatory forbearance is dramatic relief, the Commission has engaged in line drawing when it established its cable coverage threshold and essentially did the same in establishing cable operator's residential voice market share threshold. Moreover, the forbearance relief it did grant was based on "static" or "snapshot" cable data that satisfied these thresholds. Line drawing and decision making based on this type of information is fully permissible. *See AT&T v. FCC*, 220 F3d 607, 627 (D.C. Cir 2000) (stating that "the Commission has wide discretion to determine where to draw administrative lines").

[31] Verizon November 17 *Ex Parte* at 6.

[32] *Omaha Forbearance Order*, ¶ 65 ("We begin by examining the retail market ...").

[33] *Omaha Forbearance Order*, ¶ 66.

Similarly, the *Anchorage Forbearance Order*, which dealt solely with forbearance from unbundling requirements, stated that "the Commission begins by examining the level of retail competition to the incumbent LEC ..."[34] In that order, "[c]onsistent with prior forbearance proceedings[,]" the Commission evaluated the request for forbearance from Section 251(c)(3) obligations by "examining the level of competition in the retail market ..."[35] The Commission found that retail competition in Anchorage was robust and that the local cable operator had "captured **[confidential]** percent of residential lines" there.[36] Contrary to Verizon's argument, a finding of sufficient competitive residential market share is a precondition of Section 251(c)(3) forbearance under both the *Omaha* and *Anchorage Forbearance Orders*.

Incredibly, Verizon contends that a residential market share test is inappropriate for consideration of forbearance from unbundling obligations because the Commission has recognized that the Section 252(d)(2) impairment standard is "instructive" in deciding whether to forbear from those obligations.[37] The Commission has already established rules implementing the impairment standard that define where, based on actual and potential competition, ILECs are relieved of unbundling obligations.[38] Insofar as impairment is the touchstone of forbearance, which it should be, there is no basis under that standard for granting forbearance relief where competitors are impaired under the Commission's rules. The impairment standard supports maintaining ILEC unbundling obligations, not the other way around. Moreover, contrary to Verizon's claim, if the Commission were to conduct an impairment analysis, it would find that CLECs are impaired without access to copper loop UNEs[39] along with DS1 and DS3 loop and

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[34] *Anchorage Forbearance Order*, ¶ 9.

[35] *Anchorage Forbearance Order*, ¶ 27.

[36] *Anchorage Forbearance Order*, ¶ 28.

[37] Verizon November 17 *Ex Parte* at 6.

[38] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 66, 146 (2005) ("*TRRO*"), *aff'd, Covad Comm'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[39] In the *TRO*, the Commission explicitly held that CLECs are impaired on a national basis without unbundled access to copper loops, "whether they seek to provide narrowband or broadband services" and that "no party seriously asserts that stand-alone copper loops" should not be unbundled. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local*

transport (including dark fiber transport) UNEs where the D.C. Circuit affirmed *TRRO* non-impairment thresholds are not satisfied.[40] Verizon's assertion otherwise is pure nonsense (and, if taken seriously, would mean that the Commission applied the wrong standard in the Omaha and Anchorage cases even though Verizon claims the Commission should follow those cases here).

Although Verizon wrongly claims that mass market share is irrelevant to forbearance, it nonetheless tries to manipulate the record data about market share in an attempt to inflate competition. Very conspicuously, Verizon never calculates the actual total number or percentage of lines served by facilities-based competitors, which was the approach used in the *Omaha* and *Anchorage Forbearance Orders*. It invents a new test--"voice connections." This allows it to include (very rough and unverifiable) estimates of "cut the cord" wireless subscribers and "over the top" VoIP subscribers, even though the Commission declined to consider such figures in both Omaha and Anchorage. In both of those cases, the Commission chose not to consider either wireless or over-the-top VoIP providers in evaluating competition because petitioners had not submitted sufficient information concerning the substitutability of wireless or over-the-top VoIP in the MSAs to permit the Commission to further refine its wire center analysis.[41] The undersigned competitive carriers and others have already explained that Verizon has done nothing more in support of over-the-top VoIP and wireless substitution in this proceeding.[42]

Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 18 FCC Rcd 16978, ¶ 226 (2003) ("*TRO*"), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004). Tellingly, Verizon and the other BOCs never challenged the Commission's national unbundling determination as to standalone unbundled copper loops. Nor did the D.C. Circuit ever condemn the Commission's national impairment finding for standalone unbundled copper loops.

[40] *See* 47 C.F.R. § 51.319(a)(4)-(5) & (e)(2)-(3).

[41] *Omaha Forbearance Order* at ¶ 72; *Anchorage Forbearance Order* at ¶ 29.

[42] Opposition of ACN *et al.*, WC Docket No. 06-172 (filed Mar. 5, 2007) at 28. Nor can the Commission give any credence of Verizon's specious claim that "over-the-top" VoIP services constrain its market power when Verizon owns critical VoIP patents needed to provide the service and used those patents in an effort to force the largest VoIP provider out of business. Reply Comments of ACN et al., WC Docket No. 06-172 (filed Apr. 18, 2007) at 7.

Verizon contends that 16% of households have "cut the cord" based on estimates by financial analysts that this percentage of households would have "cut the cord" nationwide by the end of 2007.[43] In the *Anchorage Forbearance Order*, the Commission chose not to include wireless substitution in its estimate of competition because petitioner relied on "general statements by industry analysts projecting wireless competition to grow in the future."[44] This is precisely what Verizon relies on here. Nor has Verizon shown that wireless and over-the top VoIP could serve as a equal substitute to wireline UNEs and the robust services that are being provisioned over UNEs, including DSL, metro Ethernet, and multi-channel video, among others. Accordingly, the Commission must reject over-the-top VoIP and wireless substitution in its evaluation of competition.

Verizon's "voice connections" approach should also be rejected because it apparently includes competitors' services provided over UNEs in the "non-Verizon" total, which the FCC specifically rejected in the *Omaha Order*.[45] In addition, Verizon's latest calculations still rely on E911 listings data to estimate competitive market share, which is invalid for the reasons discussed in the next section of this letter.

Even ignoring these methodological problems with Verizon's "voice connections" approach, and even after Verizon's strenuous efforts to massage the data and show the facts in the light most favorable to its case, the best it can come up with is Figure 2, which by itself is all the evidence the Commission needs to find that Verizon has not met its burden of proof. Although the caption on this figure reads "Verizon Wireline Access Lines Constitute a Small Share of Voice Connections," Figure 2 itself shows that Verizon's "small" share is **[Begin Highly Confidential]** **[End Highly Confidential]** percent in Philadelphia, for example. Despite having wrongly included wireless and interconnected VoIP subscribers, presenting the evidence in the light most favorable to its case, and ignoring the criteria used in Omaha and Anchorage, Verizon still must admit it controls **[Begin Highly Confidential]** **[End Highly Confidential]** in five of six MSAs.[46] The Commission thus would be fully justified in denying relief based on

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[43] Verizon November 17 *Ex Parte* at 7.

[44] *Anchorage Forbearance Order*, n.91.

[45] *Omaha Forbearance Order*, ¶ 68. It is also unclear whether Verizon included switched wholesale (and resale) access lines in the competitive market share total, which would further distort the figures.

[46] The one MSA in which Verizon does claim its competitors have **[Begin Highly Confidential]** **[End Highly Confidential]** happens to be the only one in which there are a significant number of

Verizon's own misleading slant on the record. More to the point, however, as shown in our November 15, 2007 *ex parte* letter, the real share of competitive lines using the Omaha criteria is considerably lower than Verizon claims here[47] and is insufficient to justify Section 251(c)(3) forbearance under the standard of the *Omaha Forbearance Order*.

Residential E911 Data

Verizon asserts that the Commission relied on residential E911 listings that Qwest supplied to measure the extent of competition and cable company data "corroborate" its E911 listings data. This is wrong. Apart from the fact that Verizon unlawfully used E911 data in this proceeding,[48] the record is replete with evidence demonstrating how unreliable E911 evidence is. Verizon cherry picks various MSAs where certain cable companies reported more lines than Verizon originally estimated and concludes that this is because cable market penetration has grown in the six or nine months since Verizon made its estimate. Verizon conspicuously ignores or fails to provide the specific percentages in other markets in which the cable data is dramatically *lower* than its E911 estimate.[49] It also ignores the fact that the "residential" data Comcast and RCN provided is not purely residential and includes small business customers. As the record demonstrates, Verizon's attempt to determine market share of residential lines based on E911 numbers is not much better than throwing darts at a page of numbers. In short, Verizon's effort to rehabilitate its E911 data is like putting lipstick on a pig.

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residential access lines being provided over Verizon UNEs, which Verizon mistakenly weighs on the competitive side of the scale.

[47] Letter from Andrew D. Lipman, Counsel for Cavalier *et al.*, to Marlene H. Dortch, WC Docket No. 06-172 (filed Nov. 15, 2007) at 2.

[48] *See, e.g.*, Motion to Dismiss of ACN *et al.*, WC Docket No. 06-172 (filed Oct. 16, 2006); COMPTEL's Comments in Support of Motion to Dismiss, WC Docket No. 06-172 (filed Oct. 30, 2006); Letter from J.G. Harrington, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket 06-172 (filed Jan. 12, 2007); Opposition of EarthLink and New Edge Network, Inc. to the Petitions of Verizon Telephone Companies for Forbearance, WC Docket No. 06-172 (filed Mar. 5, 2007) at 55-58 and Exhibit 1 at 1-2. Relatedly, the United States House of Representatives recently passed a bill that also prohibits the use of E911 information for competitive purposes. *See* H.R. 3403, 110 Congress (2007) (section entitled "Prohibited Use of Location Information Databases").

[49] *See* Letter from Russell M. Blau, Counsel for Cavalier *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed November 15, 2007).

Nor does Verizon's Attachment D comparison between its own residential line count and its E911 listings somehow demonstrate its E911 information is reliable. Although this comparison shows a relatively small error rate, it does confirm that Verizon's choice to present its own market share on a different basis (lines) than its competitors' market share (E911 listings, which correspond to telephone numbers) did systematically understate Verizon's market share and overstate its competitors'. Also, it is noteworthy that Verizon chose not to provide a similar calculation for business lines, where the overstatement certainly would have been dramatically larger.

In any event, both Verizon's E911 numbers and the cable operators' actual residential lines fall dramatically short of the levels of retail competition found sufficient in previous cases to warrant forbearance relief. Verizon has the burden of proof to show sufficient competition and even after manipulating the data in every way it could think of, it hasn't made its case.

Business E911 Data

Verizon claims that its data on business E911 listings is evidence there is extensive cable and CLEC competition throughout each of the six MSAs and that forbearance is appropriate.[50] Once again, Verizon is wrong. At the outset, it must be emphasized that in granting UNE forbearance the *Omaha Forbearance Order,* the Commission did not base its decision on business customer line counts but rather considered the cable operator's significant market share of residential lines and its rate of growth in business lines in determining whether further review of the forbearance request was appropriate.[51]

In defense of its flawed E911 data,[52] Verizon claims that E911 listings are a good measure of business competition because a larger business will use more telephone numbers and is more competitively significant than one with fewer numbers. First of all, this is not true, because it is heavily biased by the type of business (law firms and other professional practices, for example, will likely use more telephone numbers than industrial or retail businesses of similar size). Second, and more important, regardless of

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[50] Verizon November 16, 2007 Ex Parte at 10.

[51] *Omaha Forbearance Order,* ¶ 66. The Commission reasoned that a carrier will pursue the more lucrative enterprise market once it has satisfied the residential market.

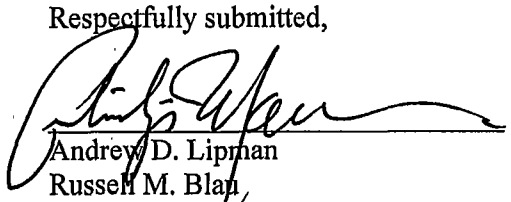
[52] *See, e.g., CLEC 9/4/07 Ex Parte* at 14-20; Letter from Brad Mutshcelknaus, Counsel to Covad *et al,* to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172, at 4 (filed Nov. 5, 2007).

whether lines or telephone numbers is a more useful indicator of competitive activity, Verizon deliberately painted an inaccurate picture of market conditions by presenting its own market share in terms of lines, and its competitors' in terms of numbers. Even after this distortion has been pointed out repeatedly, Verizon has chosen not to correct it. Given Verizon's refusal to provide more accurate data within its possession (the number of its own E911 business listings), the Commission would be justified in inferring that a more honest comparison of market shares would be unfavorable to Verizon's position.

Conclusion

When Verizon filed its Petitions, it boldly asserted that it satisfied the Omaha forbearance standard. The facts unequivocally show that Verizon cannot prove this claim, because the marketplace in the six MSAs at issue simply are not as competitive as Omaha. Regardless of whether the *Omaha Forbearance Order* sets forth a legal standard that should guide the Commission in subsequent UNE forbearance decisions (and the undersigned carriers emphasize that it does not), Verizon's failure to prove the claims in its Petitions is sufficient reason by itself to deny all of its Petitions without further ado.

Respectfully submitted,



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